JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

A

Lim Son Heng v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–377 OF 2010
AZAHAR MOHAMED, ROHANA YUSUF AND HAMID SULTAN JJCA
29 APRIL 2014

C

Criminal Procedure — Trial — Misdirection — Trial judge failed to separately consider whether defence rebutted presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 ('DDA') — Rule in Mohamad Radhi bin Yaakob v Public Prosecutor [1991] 3 MLJ 169 — Whether on facts trial judge's failure occasioned substantial miscarriage of justice — Whether overwhelming evidence against accused did not warrant trial judge undertaking 'Radhi's direction' — Whether accused had exclusive possession of premises where drugs and drug-making utensils found — Whether actual possession made out and trial court correct to invoke s 37(da) — Whether accused involved in 'manufacturing' of illicit drugs and hence was 'trafficking' under s 2 of the DDA

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The appellant was convicted and sentenced to death by the High Court on four charges of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') at a condominium unit ('the premises') rented by the appellant. With regard to the first and fourth charges (ie concerning 567.06g of methamphetamine, 102.3g of heroin and 7.15g of monocetylmorphines) the

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trial court concluded that since those drugs were found by police in the unlocked main room of the premises, the appellant had control, custody and knowledge, and therefore 'possession', of the drugs. The trial court accordingly invoked s 37(da) of the DDA to presume 'trafficking'. With regard to the second and third charges (ie concerning 16.1g nimetazepam and 20,476.39g

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of ketamine) the trial court found the appellant was involved in the manufacturing of those drugs; an act which constituted 'trafficking' under s 2 of the DDA. This was due to the discovery of several illicit drug making utensils in the premises over which the appellant had care and management. The appellant was arrested shortly after a police party acting on a tip-off noticed

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him leaving the premises after locking the place. Using the keys recovered from the appellant after a body search, the police entered the premises and found the drugs and the drug-making utensils. In the instant appeal against conviction and sentence, the appellant said the trial judge's failure to separately consider whether his defence had on balance of probabilities rebutted the presumption

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of trafficking under s 37(da) of the DDA was fatal and warranted his acquittal on the first and fourth charges on the basis of the principle established in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. The appellant also contended that s 37(da) should not have been invoked since the prosecution failed to prove he had exclusive possession of the premises, and

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

thereby, control, custody and knowledge of the drugs. He argued that the prosecution had also failed to prove he was involved in the manufacturing of the drugs in question.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) In the context of the present case, the trial judge's failure to separately consider whether the appellant's defence had rebutted the presumption of trafficking under s 37(da) of the DDA on balance of probabilities did not occasion a substantial miscarriage of justice. The circumstances of the case did not obviously warrant the trial judge undertaking such a separate exercise. The appellant was not in passive possession of the drugs in question. Considering the quantity of the drugs, it was unlikely they were for his consumption and they were found in a drug-manufacturing setting. In the absence of contradiction or credible explanation, this fact was sufficient to lead to a strong inference that the appellant was eventually going to transfer possession of the drugs to another party. In view of the overwhelming evidence, even if the trial judge had undertaken a separate exercise of assessment in accordance with the rule in *Mohamad Radhi bin Yaakob v Public Prosecutor*, he would have come to the conclusion that the appellant had failed on balance of probabilities to rebut the s 37(da) presumption of trafficking (see para 28).

(2) There was no doubt the appellant had possession of all things inside the premises to the exclusion of others. The keys to the premises were recovered from him; the evidence of four witnesses identified him as the tenant of the premises and several documents and receipts bearing his name were found in one of the rooms. All the doors to the rooms in the premises were also unlocked showing that the appellant enjoyed complete custody and control of the place and of the items found therein. The evidence when taken together led to the conclusion that at all times the offending drugs were in the appellant's custody and control and the irresistible inference was that he had knowledge of the drugs. The prosecution had made out a case of actual possession independent of the presumption of possession under s 37(d) of the DDA and the trial court had, consequently, correctly invoked s 37(da) (see paras 12 & 15–16).

(3) On the facts it could be concluded that the premises was a drug manufacturing setting. The drugs in the second and third charges must have been manufactured in the premises based on the chemist's evidence that there were traces of those drugs on some of the utensils found in the premises. Judging by the huge quantity and types of drugs found and packed, they were undoubtedly meant for trafficking. The appellant must have had knowledge of and been involved in the manufacturing of the drugs because he was the occupier and had care and management of the premises (see para 20).

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

[Bahasa Malaysia summary

Perayu telah disabit dan dihukum mati oleh Mahkamah Tinggi atas empat tuduhan pengedaran dadah di bawah 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') di unit kondominium yang disewa oleh perayu. Berkenaan dengan tuduhan pertama dan keempat (iaitu berkenaan 567.06g methamphetamine, 102.3g heroin dan 7.15 monocetylmorphines) mahkamah perbicaraan memutuskan bahawa memandangkan dadah-dadah tersebut ditemui oleh polis di premis di dalam bilik utama yang tidak berkunci, perayu mempunyai kawalan, jagaan dan pengetahuan, dan oleh itu 'posession' atas dadah-dadah tersebut. Mahkamah perbicaraan telah dengan sewajarnya menggunakan s 37(da) ADB untuk anggapan 'trafficking'. Berkaitan dengan tuduhan kedua dan ketiga (iaitu berkenaan 16.1g nimetazepam dan 20,476.39g ketamine) mahkamah perbicaraan mendapati perayu terlibat dalam pembuatan dadah-dadah tersebut; suatu tindakan yang mana menjadi 'constituted' di bawah s 2 ADB. Ini adalah disebabkan penemuan beberapa alat pembuatan dadah haram di dalam premis-premis yang mana telah dijaga dan dikendalikan oleh perayu. Perayu telah ditangkap sebaik sahaja selepas sekumpulan polis bertindak atas maklumat melihat dia meninggalkan premis-premis selepas mengunci tempat tersebut. Dengan menggunakan kunci yang didapati daripada perayu selepas pemeriksaan badan, polis memasuki premis-premis dan menemui dadah-dadah dan alat pembuatan dadah tersebut. Dalam rayuan ini terhadap sabitan dan hukumam, perayu berhujah bahawa kegagalan hakim perbicaraan untuk mempertimbangkan secara berasingan sama ada pembelaannya atas imbangan kebarangkalian mematahkan anggapan pengedaran di bawah s 37(da) adalah menjejaskan dan mewajarkan pembebasannya untuk tuduhan pertama dan keempat berdasarkan prinsip yang dikemukakan dalam kes *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. Perayu juga menegaskan bahawa s 37(da) tidak sepatutnya digunakan kerana pendakwaan gagal untuk membuktikan bahawa dia mempunyai milikan ekslusif ke atas premis-premis, dan dengan itu, mengawal, menjaga dan mempunyai pengetahuan terhadap dadah-dadah tersebut. Dia berhujah bahawa pendakwaan juga gagal untuk membuktikan dia terlibat dalam pembuatan dadah-dadah yang dikatakan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Dalam konteks kes ini, kegagalan hakim perbicaraan untuk secara berasingan mempertimbangkan sama ada pembelaan perayu telah mematahkan anggapan pengedaran di bawah s 37(da) atas imbangan kebarangkalian tidak menyebabkan salah laksana keadilan yang substansial. Keadaan kes itu tidak mewajarkan hakim membuat keputusan berasingan. Perayu bukan mempunyai milikan pasif terhadap dadah itu. Mempertimbangkan kuantiti dadah, adalah tidak mungkin ia adalah untuk kegunaaanya dan ia dijumpai di set pembuatan dadah. Dalam ketidakhadiran percanggahan atau penjelasan boleh dipercayai,

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

fakta ini adalah mencukupi untuk menunjukkan inferens yang kukuh bahawa perayu akhirnya akan memindahkan milikan dadah itu kepada lagi satu pihak. Memandangkan keterangan yang kukuh, jika pun hakim perbicaraan membuat keputusan berasingan terhadap penilaian menurut keputusan *Mohamad Radhi bin Yaakob v Public Prosecutor*, dia akan membuat kesimpulan yang sama bahawa perayu gagal pada imbangan kebarangkalian untuk mematahkan anggapan pengedaran s 37(da) (lihat perenggan 28)

(2) Tiada keraguan perayu memiliki kesemua barang-barang di dalam premis sehingga pengecualian terhadap lain-lain. Kunci premis-premis telah didapati daripadanya; keterangan empat saksi mengenal pastinya sebagai penyewa premis-premis dan beberapa dokumen dan resit atas namanya dijumpai di dalam salah satu bilik. Kesemua pintu kepada bilik-bilik di dalam premis-premis juga tidak berkunci menunjukkan perayu mempunyai jagaan dan kawalan penuh terhadap tempat dan barang-barang dijumpai di dalamnya. Keterangan diambil bersama membawa kepada kesimpulan bahawa pada setiap masa dadah haram itu berada dalam jagaan dan kawalan perayu dan inferens kukuh adalah bahawa dia mempunyai pegetahuan terhadap dadah itu. Pendakwaan telah membuat kes milikan sebenar dengan bergantung kepada anggapan milikan di bawah s 37(d) ADB dan mahkamah perbicaraan telah, sebagai keputusannya, dengan betul menggunakan s 37(da) (lihat perenggan 12 & 15–16).

(3) Atas fakta ia boleh disimpulkan bahawa premis itu adalah tempat pembuatan dadah. Dadah dalam dakwaan kedua dan ketiga mesti telah dibuat di dalam premis-premis berdasarkan keterangan ahli kimia bahawa terdapat tanda-tanda dadah itu pada beberapa alat-alat yang ditemui di dalam premis-premis. Menilaikan daripada kuantiti besar dan jenis dadah yang ditemui dan dibungkus, ia tanpa keraguan bermaksud untuk pengedaran. Perayu mesti mempunyai pengetahuan dan telah terlibat dalam pembuatan dadah kerana dia adalah penghuni dan mempunyai jagaan dan mengendalikan premis-premis (lihat perenggan 20).]

Notes

For cases on misdirection, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5616–5629.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

A *Mohamad Yazri bin Minhat v PP* [2003] 2 MLJ 241, CA (refd)
Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
R v Woodman [1974] 2 All ER 955, CA (refd)
B *Tan Kim Ho & Anor v PP* [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Legislation referred to

C Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), (2)

Appeal from: Criminal Trial No 45–57 of 2009 (High Court, Kuala Lumpur)

Shafee Abdullah (Shafee & Co) for the appellant.
D *Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Azahar Mohamed JCA (delivering judgment of the court):

E **[1]** The appellant was convicted and sentenced to death by the High Court on four charges of trafficking in dangerous drugs, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable with mandatory death penalty under s 39B(2) of the DDA.

F **[2]** The offences were said to have been committed at a condominium unit, B-19-12, Puncak Banyan Kondo, Jalan 3/118B, Taman Connought, Cheras, Kuala Lumpur ('the premises') at about 9pm on 24 February 2009. The following were the offending drugs seized from the premises:

G (a) first charge: 567.06g of methamphetamine;

(b) second charge: 16.1g of nimetazepam;

(c) third charge: 20,476.39g of ketamine; and

H (d) fourth charge: 102.3g of heroin and 7.15g of monoacetylmorphines.

[3] Aggrieved by the decision of the High Court, the appellant appealed to this court. We heard his appeal, wherein at its conclusion we unanimously dismissed it. We affirmed the conviction and sentence. We now give our I reasons for so deciding.

[4] The learned High Court judge had set out in his judgment the facts of the case and the relevant as well as the significant evidence which he held in support of a prima facie case against the appellant (see pp 406–416, vol 2, of

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

the appeal record). The pertinent facts are these. The events as unfolded revealed that acting on information received, on 24 February 2009 at about 5pm, a team of police officers arrived at Puncak Banyan Kondo, Jalan 3/118B, Taman Connought. Two of the police officers, namely D/Kpl/W Yeo Yen Peng ('PW4') and D/Kpl/W Hamisah bt Samsudin ('PW5') went into the area of the condominium. Subsequently, PW4 went up to the 19th floor to do a surveillance on the premises and stationed herself at the nearby emergency staircase.

[5] At around 6.45pm, PW4 saw the appellant coming out from the said premises while holding a plastic bag and locked the grille door with a padlock before heading to the lift. Soon after that, PW5 who was taking position at the ground floor saw the appellant came out of the lift and went inside a Toyota Harrier car. PW5 at once informed the head of the team, ASP Balasubramaniam a/l Rajoo ('PW7') as soon as the Toyota Harrier car left the area. Afterwards PW7 with three other police officers followed the Toyota Harrier car, which proceeded through the Federal Highway and entered into Jalan Kelang Lama. Then, the car stopped in front of the KB Children's Clinic Centre. Before long, the appellant came out while holding a plastic bag heading to a Honda CRV car. The appellant handed over the plastic bag to one Lee Eng Kong, who was standing next the Honda CRV car. After that, the appellant went back to the Toyota Harrier car. At that moment, PW7 signalled his officers to raid both cars. Both the appellant and Lee Eng Kong were arrested. A body search was conducted but there was no incriminating evidence found on him or inside the Toyota Harrier car. However, the keys to the said premises were recovered by PW7 from the appellant.

[6] The appellant was then brought back by the police to the premises. There, PW7 used one of the keys to unlock the padlock and the other key to unlock the main door of the said premises. There were three rooms in the said premises. Inside the said premises, various utensils, drugs paraphernalia, chemical substances and tools which were suspected to be used for manufacturing dangerous drugs were found. The subject matter of the charges against the appellant namely, heroin; monoacetylmorphine; methamphetamine; ketamine and nimetazepam were found in the main room together with a stainless tableting machine and two manual tablet presses. The evidence from the photographs (exh P10 (9–15)) and the list of the items seized from the premises (exh P17) indicate the extent of the investigation carried out by the police inside the premises. The detail of the items seized (including the drugs which formed the subject matter of the charges) from the various places of the said premises are well set out in the judgment of the learned High Court judge (see pp 408–416 of the appeal record).

[7] Before us, learned counsel for the appellant argued that the learned High

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

Court judge had erred in finding the appellant guilty under s 39B(1)(a) of the DDA and sentencing him to death under s 39B(2) of the same DDA on the ground that the prosecution's failure in proving the ingredients of 'control', 'custody' and 'knowledge' over the drugs will also result in the failure to establish 'possession'. Learned counsel argued that there was no evidence of the exclusivity of possession of the said premises to render the appellant as its occupier. Hence, it was argued that as there was no act of actual 'possession' proven by the prosecution, the presumption of 'trafficking' pursuant to s 37(da) of the DDA could not be invoked.

[8] For the proper determination of this appeal, it is important to bear in mind that for the first and fourth charges, the prosecution relied on s 37(da) of the DDA in proving 'trafficking'. On the other hand, as for the second and third charges, the prosecution relied on s 2 of the DDA in proving the act of 'trafficking'.

[9] The 567.06g of methamphetamine (the subject matter of the first charge) and the mixture 102.3g of heroin and 7.15g of monoacetylmorphines (the subject matter of the fourth charge) were found in the main room. It is the prosecution's case that the main room was unlocked at all material time. The learned High Court judge had found that the appellant had the control and custody over the incriminating items found inside the premises and should have the knowledge of the drugs. The learned High Court judge held that as the appellant had the custody, control and knowledge over the drugs, the ingredient of possession was established. In the words of the learned High Court judge:

> Hanya dengan membuktikan jagaan dan kawalan tidak mencukupi untuk membukti pemilikan. Perlu juga dibuktikan OKT mengetahui barang-barang yang ada di bawah kawalannya itu adalah dadah berbahaya. Berhubung perkara ini adalah menjadi undang-undang mantap bahawa ianya boleh dirumuskan dari keadaan setiap kes. Adalah penting untuk mahkamah mengambil kira faktor-faktor sekeliling seperti dari mana dadah dijumpai, bagaimana ianya dijumpai, bagaimana ianya disimpan, berat dadah yang dijumpai dan sebagainya bagi membuat rumusan berhubung pengetahuan di pihak OKT.

[10] Since the amount of the impugned dangerous drugs was in excess of the prescribed weight, the learned High Court judge invoked the presumption under 37(da) of the DDA. The appellant was presumed to be trafficking in the said drugs unless he was able to prove to the contrary on the balance of probabilities.

[11] In our judgment, having regard to the surrounding and prevailing circumstances of the case, the learned High Court judge was entitled and correct in making such a finding. In this regard, we refer to the case of *Public*

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

Prosecutor v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, where Ariffin Zakaria FCJ (as His Lordship then was) in discussing the issue of possession had referred to the case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 and decided:

> In *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 at p 239 he observed:
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> > 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304): A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in the case of need. To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi, intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[12] Coming back to the present case, the learned deputy public prosecutor ('the DPP') had with care took us through a number of pieces of evidence that established possession of the impugned drugs on the part of the appellant. Apart from the fact that PW4 saw the appellant coming out from the said premises and locked the grilled door with a padlock, what is more glaring was the fact that the keys to the said premises were recovered by PW7 from the appellant. These keys were later used by the police to unlock the padlock and the main door of the said premises. The next point which has a strong bearing on the issue is the evidence of Loke Kuan Chui ('PW6'), Loke Kuan Yin ('PW9'), Lau Wui Hong ('PW12') and Wong Chee Yee ('PW15'), who confirmed and identified the appellant as the tenant who rented the premises. Their evidence when considered in its entirety showed that the appellant had care and management over the said premises at that material time. Even more to the point is that several documents and receipts bearing his name were also found in one of the rooms of the premises (see search list, exh P17 Items 47–52). In our judgment, all this admissible evidence when taken together lead to the conclusion that at all material time, the offending drugs were in the custody and control of the appellant and further the irresistible inference that could be drawn in the circumstances was that the appellant all along knew about the drugs found in the premises. Accordingly, in our judgment, the prosecution had made up a case of actual possession, independent of the presumption of possession under s 37(d) of the DDA. In view of s 37(da) of the DDA, the appellant was correctly presumed by the learned High Court judge,

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

to be trafficking in the said drugs unless he proved to the contrary on the balance of probabilities.

[13] As regards the argument by learned counsel for the appellant that there was no evidence of the exclusivity of possession of the said premises to render the appellant as its occupier, we refer to the elucidation by Taylor J on the concept of possession in the case of *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 at p 31:

> The dictionary definition brings in the idea of exclusiveness. It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from the enjoyment of the property.

[14] With respect, it is incorrect to argue that just because someone else has access to the house, the person occupying that house would lose exclusive possession of all the things inside the house. *R v Woodman* [1974] 2 All ER 955 is a case concerning theft of scrap metal from a factory site, where the owners had put up fencing around the site to keep out trespassers. The owners themselves were unaware that remnants of scrap metal still remained in the factory. Lord Widgery CJ in delivering the judgment of the Court of Criminal Appeal held that:

> We have formed the view without difficulty that the recorder was perfectly entitled to do what he did, that there was ample evidence that English China Clays were in control of the site and had taken considerable steps to exclude trespassers as demonstrating the fact that they were in control of the site, and we think that in ordinary and straightforward cases if it is once established that a particular person is in control of a site such as this, then prima facie he is in control of articles which are on the site.

[15] On the facts of the present case, there can be no doubt that the appellant had possession of all the things inside the premises to the exclusion of other people. This is evidenced from the fact that he made sure he locked the grille door with a padlock before he left the premises, the keys to the premises were found with him. In such a situation, the appellant 'has the power to exclude other persons from the enjoyment of the property' as explained by Taylor J in *Leow Nghee Lim*.

[16] To support his contention that other persons had access to the premises, learned counsel argued that the main room where the offending exhibits were found, was allegedly forced open. In his defence, he said 'pihak polis pun melanggar atau mereka menghentam pintu itu sehingga hancur dan rosak'. On the other hand, PW7 said the door to the main room and in fact, all the rooms

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

in the premises were not closed when they entered the premises. PW7 is a witness of truth as the photograph to the main door (exh P10 (13)) which was taken by Corporal Ahmad Zafri Mat Noor ('PW2') on 25 February 2009 showed that the main door is still intact. The fact that all the doors to the rooms were left open in the premises would go to show that the appellant enjoyed complete custody and control of all the area and items found therein.

[17] Still on the subject matter of access to the premises, learned counsel also raised the issues, which he referred to as gaps in the prosecution's case. It was said that the credibility of prosecution's witnesses in particular PW4 is highly suspicious due to contradiction in her evidence in relation to the presence of a camcorder at the scene. Learned counsel also raised the so-called shoddy investigation in particular the negative fingerprints and DNA tests in the premises. In our judgment, those discrepancies were not material ones so as to strike at the very root of the charges. In no way, in our view, the so called contradictions could affect the credibility of PW4 (see *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15). On the issue of fingerprints and DNA tests, we agree with the arguments of the learned DPP that the negative results of the tests had no bearing on the issue of possession of the drugs considering that, as we have said earlier, the appellant had enjoyed complete custody and control of the premises and thereby had the exclusive power to deal with the drugs in question.

[18] Turning now to the second and third charges, it was the finding of the learned High Court judge that the said premises was used as a place to manufacture the drugs. The learned High Court judge held that even though the appellant was not arrested while manufacturing the drugs, the fact that the appellant was seen coming out of the said premises raised an inference that the appellant had manufactured the drugs found there. In the words of the learned High Court judge:

> Dalam kes ini, ahli kimia SP3 ada dipanggil untuk memeriksa peralatan yang berada di unit tempat kejadian. Hasil pemeriksaan oleh SP3 atas peralatan dan bahan yang dijumpai di unit tempat kejadian, SP3 mengesahkan unit tersebut diguna untuk memproses dadah. Sebagai disebut di awal penghakiman ini ditangkap sedang memproses dadah, tetapi satu-satu inferens yang boleh dibuat dari keadaan kes ini adalah OKT telah memproses dadah yang telah dirampas. Ini memenuhi tafsiran mengedar di bawah s 2 Akta Dadah Berbahaya.

[19] Section 2 of the DDA defines trafficking to include the doing of any of the following acts, that is to say, 'manufacturing', importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs. Section 2 of the DDA also defines the word 'manufacture', in relation to a dangerous drug to include the making,

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

producing, compounding and assembling of the drug; the making, producing, compounding and assembling a preparation of the drug; the refining or transformation of the drug into another dangerous drug; and any process done in the course of the foregoing activities. It is true that there was no eyewitness who saw the appellant in the act of making, producing, compounding, assembling or refining the impugned drugs. Even without direct evidence, there was a number of pieces of evidence that raised an irresistible inference that the drugs were manufactured by the appellant in the premises. Prior to the event leading to the appellant's arrest, PW4 saw the appellant coming out from the said premises. The appellant had care and management over the said premises at all material time. As we have mentioned earlier, inside the said premises, various utensils, drugs paraphernalia, chemical substances and tools which were suspected to be used for manufacturing dangerous drugs were found. Dangerous drugs in the form of pills, powdery substance and crystalline substance were found in huge quantity inside the said premises. In this regard, the chemist, Chan Kee Bian ('PW3') in his evidence said:

> S: Berkenaan dengan tableting equipment dan material itu, boleh kamu nyatakan pandangan kamu sebab kamu ada menganalisa pada awalnya, pada 25.2.2009? Bolehkah kamu nyatakan pandangan kamu mengenai tempat yang dianalisa itu?
>
> J: The tableting machine could be used to make tablets because they contained traces of Methamphetamine, Caffeine and also the presence of Magnesium Stearate and dextrin which I actually used for tablet excipients, meaning they are added to make tablets. Magnesium Stearate is added as the lubricant for the tablet.

[20] On the facts of the present case, it can be concluded that the premises was a drug manufacturing setting. Those drugs must have been manufactured in the said premises when PW3 confirmed there were traces of drugs of the same nature found on some of the tools and utensils in the said premises. We agree with the argument of the learned DDP that judging by the huge quantity and the manner the drugs found and packed, they are undoubtedly meant for trafficking and ready to be distributed to the potential buyers in the market. All of which lead us to conclude that the appellant had knowledge and was involved in the manufacturing of the impugned drugs because he was the occupier and had care and management of the premises. It is for these reasons, we did not accept the contention of learned counsel for the appellant that the prosecution had failed to prove the act of manufacturing on the part of the appellant pursuant to s 2 of the DDA.

[21] We turn next to the argument of learned counsel for the appellant of misdirection in law by the learned High Court judge by way of non-direction in that he had failed to adequately consider the defence of the appellant that the said premises was rented by him for the use of 'Kai Chai' and he has nothing

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

whatsoever to do with that premises. We did not see any merit in this argument. This version about 'Kai Chai' only appeared for the first time during the defence stage. If at all the appellant rented the premises for Kai Chai and he was asked on that material date to hand over a bag to someone in Old Klang Road by Kai Chai, this defence should be raised at the earliest possible stage and ought to be firmly put to the prosecution witnesses to test the veracity of his version. The introduction of this 'belated version' at this stage would have certainly weakened the appellant's credibility. In *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236, the Federal Court commented the effect of such belated disclosure:

> This is however not to say that there is any burden placed on the accused to disprove any guilt or to prove innocence, it is only assessing the credibility of a witness, in this case the appellant's credibility, in order to determine whether an accused was telling the truth consideration is whether he had indicated his defence during the prosecution's case ...

[22] Next, it was argued that the application of s 37(d) and 37(da) of the DDA simultaneously by the learned High Court judge in convicting the appellant is prohibited under the law as it amounts to the application of 'double presumption'. We saw no merit at all in this submission. In this regard, it is important to bear in mind what the learned High Court judge said on this issue:

> Memandangkan pihak pendakwa berjaya membukti elemen pengetahuan tanpa perlu bergantung pada anggapan bawah s 37(d) maka s 37(da) boleh dipakai bagi membukti pengedaran.

[23] The passage above makes it patently clear that the learned High Court judge had invoked the presumption of trafficking under s 37(da) of the DDA, independent of the presumption under s 37(d) of the DDA. Obviously, there was no application of double presumption by the learned High Court judge as alleged by learned counsel.

[24] Finally, we now turn to the argument of learned counsel for the appellant on the misdirection in law by the learned High Court judge to undertake a separate exercise in order to consider whether or not the appellant had rebutted the presumption of trafficking under s 37(da) of the DDA. Learned counsel argued that there was no assessment and exercise done by the learned High Court judge in arriving at the conclusion that the defence had failed to rebut the statutory presumption of trafficking on the balance of probabilities as required by law. This misdirection is termed by Edgar Joseph Jr FCJ in the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 as a misdirection in law by way of non-direction. In holding that, Edgar Joseph Jr FCJ had referred and followed the principle stated by Azmi FCJ in the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991]

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

A 3 MLJ 169:

> This brings us to the next point in this appeal. Nowhere in his judgment did the judge direct attention to the statutory presumptions as to possession (s 37(da)), and as a result, he made no finding as to whether the defence had rebutted the same. In our view, this was a misdirection in law by way of non-direction having regard to the following passage in the judgment of Azmi SCJ in *Mohammad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169:
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> > In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

[25] It is true that the first and fourth charges against the appellant were offences presumed pursuant to s 37(da) of the DDA. The statutory presumption of trafficking is a rebuttable presumption in that it can be displaced by the discharging of the requisite evidential burden by the appellant. The standard of that evidential burden is that on a balance of probabilities (see *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421). It appears that the learned High Court judge had failed to consider at the close of the defence whether the appellant had indeed succeeded in rebutting the statutory presumption of trafficking on the balance of probabilities. Learned counsel argued that the absence of such separate exercise in accordance with the rule as laid down in *Mohamad Radhi bin Yaakob v Public Prosecutor* was fatal, and on this ground alone, this appeal ought to be allowed.

[26] This brings into focus the question of whether it occasioned any substantial miscarriage of justice to the appellant by reason of the failure on the part of the learned High Court judge to direct his mind whether or not the appellant had rebutted the statutory presumption of trafficking under s 37(da) of the DDA. The proviso to s 60(1) of the Courts of Judicature Act 1964 makes clear the powers of Court of Appeal:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[27] In this regard, the Federal Court in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381 has laid down the following important principle:

> As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 exemplifies the general rule, while that in *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265; [1994] 2 CLJ 151 illustrates the exception.

[28] In our judgment, in the context of the present case, the failure of the learned trial judge to direct himself on this matter has not occasioned a substantial miscarriage of justice. The circumstances in this particular case did not obviously so warrant for the learned High Court judge to undertake a separate exercise to consider whether on the balance of probabilities, the appellant has rebutted the statutory presumption of trafficking under s 37(da) of the DDA. In this instant case, the appellant was in possession of 567.06g of methamphetamine and a mixture of 102.3g of heroin and 7.15g of monoacetylmorphines, which in our view an amount much larger than was likely to be used for his own consumption. Moreover, the impugned drugs were found in a drug manufacturing setting. That is why, in our view the appellant was not in passive possession of the dangerous drugs in question. In the absence of contradiction or in the absence of any credible explanation, in our judgment, this fact was sufficient to lead to a strong inference that the purpose for which the appellant was in possession of the drugs was to eventually transfer the possession of the offending drug to another party (see *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 and *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241). Therefore, in view of the overwhelming evidence against the appellant even if he had undertaken a separate exercise of assessment in accordance with the rule as laid down in *Mohamad Radhi bin Yaakob v Public Prosecutor*, he would have come to the conclusion that the appellant had failed on the balance of probabilities to rebut the statutory presumption of trafficking under s 37(da) of the DDA.

[29] For all the reasons that we have stated, we do not see any merit in this appeal. The evidence presented by the prosecution against the appellant was compelling. It had not been shown that the various findings of the learned High Court judge were against the weight of evidence or perverse in any way. Having carefully scrutinised all the evidence contained in the appeal records and carefully read the judgment of the learned High Court judge, we were wholly satisfied that the conviction of the appellant was safe. The appeal was therefore dismissed. We accordingly affirmed the conviction and the death sentence imposed by the learned High Court judge.

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Thu Nov 6 09:40:13 2014

A *Appeal dismissed and conviction and sentence affirmed.*

Reported by Ashok Kumar

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